Sime Finance Ltd (formerly known as United Malaya Banking Finance Ltd) v Robin Woon Kim Yan

HIGH COURT (MELAKA) — CIVIL SUIT NO 23-181-1976
SURIYADI J
5 MAY 1997

Civil Procedure *— Costs — Application for taxation of bill of costs — Notice of intention to proceed — Defendant filed bill of costs for taxation five years after judgment of court rejecting plaintiff's claim and awarding costs to defendant — Whether notice of intention to proceed with the bill of costs required — Whether O 3 r 6 of the Rules of the High Court 1980 applicable — Rules of the High Court 1980 O 3 r 6*

The plaintiff filed an action against the defendant in relation to a loan granted by the plaintiff. The civil suit was eventually disposed of on 6 September 1991 culminating in the High Court rejecting the plaintiff's claim, with costs being awarded to the defendant. Five years later, the defendant filed the bill of costs for taxation. The plaintiff objected before the senior assistant registrar but was unsuccessful, hence this appeal. The plaintiff submitted, inter alia, that as no notice of intention to proceed with the bill of costs was given to the plaintiff pursuant to O 3 r 6 of the Rules of the High Court 1980 ('the RHC'), the application should be rejected.

Held, dismissing the appeal:

Where final judgment had been obtained — as in this appeal — and the taxation of the bill of costs application came later, no notice was required. On the facts of this appeal — read together with O 3 r 6 of the RHC — there was no more active step to be pursued by virtue of the order made on 6 September 1991. The provision of O 3 r 6 of the RHC has a specific function in that it imposes a notice of intention for any future action, for a cause or matter, with a history of an immediate preceding interlocutory proceeding, of which the matter at hand did not come within its scope. Therefore, O 3 r 6 was not applicable in this case (see p 475D–E).

[Bahasa Malaysia summary

Plaintif memfailkan tindakan terhadap defendan berkaitan dengan suatu pinjaman yang diberikan oleh plaintif. Guaman sivil itu akhirnya diselesaikan pada 6 September 1991 yang berkesudahan dengan Mahkamah Tinggi menolak tuntutan plaintif, dengan kos diawardkan kepada defendan. Lima tahun kemudian, defendan memfailkan bil kos untuk taksiran. Plaintif membantah di hadapan penolong kanan pendaftar tetapi tidak berjaya. Oleh itu plaintif membuat rayuan ini. Plaintif menghujahkan, antara lain, bahawa oleh kerana tiada notis tentang hasrat untuk meneruskan dengan bil kos diberikan kepada plaintif mengikut A 3 k 6 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), permohonan itu patut ditolak.

Diputuskan, menolak rayuan:

Di mana penghakiman muktamad telah diperolehi — seperti dalam rayuan ini — dan permohonan untuk taksiran bil kos dibuat kemudian, tiada notis diperlukan. Atas fakta-fakta rayuan ini — dibaca bersama dengan A 3 k 6 KMT — tidak ada lagi langkah-langkah aktif yang perlu dilakukan memandangkan perintah yang dibuat pada 6 September 1991. Peruntukan A 3 k 6 KMT mempunyai fungsi yang spesifik di mana ia memerlukan notis tentang hasrat bagi tindakan di masa hadapan, untuk kausa atau perkara, dengan sejarah prosiding interlokutori sebelumnya yang terdekat, yang mana perkara di hadapan mahkamah sekarang tidak termasuk dalam skopnya. Oleh itu, A 3 k 6 tidak terpakai dalam kes ini (lihat ms 475D–E).]

Notes

For cases on costs, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 838–1088.

Cases referred to

Bank Bumiputra Malaysia Bhd v Sykt Gunong Tujoh Sdn Bhd & Ors [1990] 1 MLJ 298 (refd)
Chapman v Chapman & Ors [1985] 1 All ER 757 (refd)
Harkness v Bell's Asbestos & Engineering Ltd [1967] 2 QB 729 (refd)
Leong Sing v Perusahaan Kuari (Melaka Pindah) Sdn Bhd & Anor [1997] 1 CLJ 307 (refd)
Pamplin v Fraser (No 2) [1984] 2 All ER 693 (refd)
Smalley v Robey & Co Ltd [1962] 1 QB 577 (refd)
Tuan Hj Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 (refd)

Legislation referred to

Limitation Act 1953 s 6
Rules of the High Court 1980 O 3 r 6, O 18 r 19, O 56 r 1, O 59 r 7(2)(c), r 7(5)
Rules of the Supreme Court O 2, O 2 r 1, O 62 r 30(6), O 69 r 29(1), O 70 [UK]

Ngeh Koo Ham (Ngeh & Co) for the appellant.
Sekar Palaniandy (Sault & Co) for the respondent.

Suriyadi J: This ground of decision is pursuant to an appeal emanating from the decision of the senior assistant registrar ('the SAR') made on 21 February 1997 which rejected the preliminary objection of the plaintiff-cum-appellant regarding a late bill of costs submitted by the defendant. After the rejection exercise, the SAR fixed a date for the hearing of the taxation of the bill of costs. It was pursuant to that rejection that I heard the appeal brought under O 56 r 1 of the Rules of the High Court 1980 ('the RHC'). Since an appeal to a judge in chambers from any judgment,

order or decision of the registrar is a rehearing of the issues, the appellant adhered to it by regurgitating the background facts before me (see *Tuan Hj Ahmed Abdul Rahrman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 and *Leong Sing v Perusahaan Kuari (Melaka Pindah) Sdn Bhd & Anor* [1997] 1 CLJ 307). In brief, the plaintiff — then known as 'United Malayan Banking Finance Ltd' — had years ago given out a loan for which the defendant stood as a guarantor. After the borrower had defaulted, the plaintiff-cum-appellant — pursuant to that guarantee — filed an action against the defendant in 1976 for a sum of RM465,000 together with interest and costs. That civil suit was eventually disposed of on 6 September 1991 culminating in the High Court rejecting the plaintiff's claim, with costs being awarded to the defendant. Five years later, on 1 August 1996, the defendant finally filed the bill of costs for taxation. To reiterate the above, the plaintiff objected before the SAR but was unsuccessful, hence this appeal.

Before me, the plaintiff made some slight changes in the approach to the whole issue and requested me to merely consider these two legal posers, namely:

(i) as no notice of intention to proceed with the bill of costs was given to the appellant pursuant to O 3 r 6 of the RHC, the application should thus be rejected; and

(ii) even if the court were not to acquiesce to the first argument as ventilated, then at best only a nominal sum should be awarded pursuant to O 59 r 7(5).

After hearing both parties, I rejected the appeal with costs and adjudged O 3 r 6 to be inapplicable. I also found that this was a curable prerequisite for interlocutory proceedings (see *Bank Bumiputra Malaysia Bhd v Sykt Gunong Tujoh Sdn Bhd & Ors* [1990] 1 MLJ 298; *Pamplin v Fraser (No 2)* [1984] 2 All ER 693 and *Chapman v Chapman & Ors* [1985] 1 All ER 757). As my finding was consonant with the decision of the SAR, I endorsed therefore her order of fixing a hearing date for the taxation proceeding.

To better comprehend the above findings, permit me to elucidate in some detail the mechanics of my arguments by introducing O 3 r 6 at the outset. This provision reads:

> Where a year or more has elapsed since the last proceeding in a cause or matter, the party who desires to proceed must give to every other party not less than one month's notice of his intention to proceed.

A simple reading of this provision without really appreciating its relevancy to issues cropping up after final judgment has been obtained certainly would require the defendant-cum-respondent to submit the notice of intention to proceed, to the plaintiff. This is more so as a year has elapsed since the High Court made the decision and awarded the defendant costs. In that vein too, I should have allowed the appeal and disallowed the action of the successful defendant who intended to enforce the costs

award. But the clarification came in the form of the case of *Bank Bumiputra Malaysia Bhd v Sykt Gunong Tujoh Sdn Bhd & Ors* [1990] 1 MLJ 298 where Haidar J viewed (at the same page):

> According to *Mallal's Supreme Court Practice* (2nd Ed) at p 16, the word 'proceeding' indicates a step 'towards' judgment and the rule, therefore, applies only when judgment has not been entered up; in other words, it refers to an interlocutory proceeding before final judgment.

To fully understand this view, it would be necessary to take a historical sojourn to trace the roots of the view and thence forth appreciate my learned brethren's conclusions. Haidar J had referred to *Mallal's Supreme Court Practice* (2nd Ed) at p 16 which I now reproduce. This relevant page reads:

> The word 'proceeding' indicates a step 'towards' judgment, and the rule, therefore, applies only when judgment has not been entered up; where judgment has been entered up within the year, no notice need be given under this rule, before execution issues on the judgment. See *Taylor v Roe* [1893] 68 LT 213; *Houlston v Doodad* (1884) 78 LT Jo 113.

After comparing Haidar J's view with that of the above passage, I found no substantive difference, except for the distinct metamorphosis of the term 'proceeding' in this context to be an interlocutory proceeding before final judgment. Having deciphered the actual wording of O 3 r 6 in some detail (buttressed by case laws), I was left with no lingering doubt in the course of my research that the opinion of Haidar J was applicable to the present appeal. For clarification, the case of *Bank Bumiputra Malaysia Bhd v Sykt Gunong Tujoh Sdn Bhd & Ors* dealt with an O 18 r 19 application of the RHC, which is interlocutory in nature, and undoubtedly would require notice. To add further, that view is now further beefed up by the commentaries made available at p 20 of the *Supreme Court Practice* 1997 (Vol 1 Pt 1) regarding O 3 r 6 which reads:

> 'Since the last proceeding' — The rule refers to *proceedings* (not communications with the opposite party — cf note *Taking a step in the action,* under s 4(1) of the Arbitration Act 1950, Vol 2 at p 18). It refers to interlocutory proceedings before final judgment, and has no reference to execution *(Houlston v Woodall* (1884) 78 LT Jo 113 (CA); *Taylor v Roe* (1893) 62 LJ Ch 391.)

Smalley v Robey v Co Ltd [1962] 1 QB 577 in no small way had given some indication as to the meaning of proceedings which is applicable for our purpose. At p 581, his Lordship Holroyd Pearce LJ said:

> 'Proceedings' are intended by these Rules to be the day-to-day steps in the actions and not merely the cause of action on which they rest. The wording of O 70 r 2 confirms me in the view that 'proceedings' means the day-to-day steps in the action ....

(The relevant sub-rules of O 70 of the then Rules of the Supreme Court ('the RSC') mentioned above in brief reads:

> Order 70 r 1 of the RSC provides that: 'Non-compliance with any of' the Rules of the Supreme Court '... shall not render any proceedings void unless the court or a judge shall so direct ... .'

A Rule 2 provides:

> No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.)

B Lord Denning in *Harkness v Bell's Asbestos & Engineering Ltd* [1967] 2 QB 729 at p 735 with regard to O 2 of the RSC gave a liberal view when he said that any application to the court, however informal, was a proceeding. Order 2 r 1 of the RSC reads:

> (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, C by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

D In the final analysis, I must conclude that where final judgment has been obtained — as in this appeal — and the taxation of the bill of costs application comes later, no notice is thus required. The facts of this appeal, when read together with O 3 r 6, left me without any doubt that there was no more active step to be pursued by virtue of the order made on 6 September 1991. If anything was left to be done, it was that of a step E forward. In a nutshell, this provision has a specific function in that it imposes a notice of intention for any future action, for a cause or matter, with a history of an immediate preceding interlocutory proceeding, of which the matter at hand does not come within its scope.

Playing the devil's advocate, it could still be argued that owing to the F prevailing dissimilarities found in the RSC and the RHC, with regard to this sub-rule, a notice is still required for taxation purposes despite a final judgment having been obtained. I was initially perturbed by O 62 r 30(6) of the RSC which provided that O 3 r 6 was not to apply to taxation proceedings, what with the brief commentary at p 21 of the White Book which elucidated succinctly the effect of this provision. The commentary G reads:

> By virtue of O 62 r 30(6), O 3 r 6 no longer applies to taxation proceedings. This change in the rules, which came into force on 29 April 1986, but which applies to all proceedings for taxation of costs, whether begun before or after that date (see RSC (Amendment) 1986(SI 1986 No 632) rr 7 and H 11(I)).

By the reasoning of the above passage, it virtually meant that prior to 28 April 1986, for purposes of a taxation proceeding, a notice of intention to proceed was required. This additional provision in a stroke made that notice redundant. It also follows that as O 3 r 6 of the RSC and the RHC I are in pari materia, and as no provision similar to O 62 r 30(6) of the RSC has been promulgated, it will thus make it encumbent upon the present respondent to give the relevant notice. The flaw in this reasoning is the undeniable differences detectable in the two Rules. Perusing the RHC — except for O 59 r 7(2)(c), which requires an applicant not to delay a taxation proceeding unnecessarily — there is no other provision available

requiring him to take immediate action to enforce the award of costs after a final judgment. Only s 6 of the Limitation Act 1953 ('the LA') places some kind of a curtailment to an unbridled period. In stark contrast, under the RSC where a party is entitled to recover taxed costs or to require any costs to be taxed by a taxing officer by virtue of a judgment, direction, order or award as provided by O 62 r 29(1), that party must begin proceedings within three months after that judgment, direction, order, award or other determination was entered. Whether it is due to the strong words provided by this sub-rule which require the action to be undertaken within that span of time, resulting in making the notice redundant, is irrelevant for the present purpose. What is significantly relevant for the present appeal is that whilst a specific time frame is provided for in the UK, none is provided in the RHC. It is only by virtue of the interpretation of the words built into O 3 r 6, as clarified by the available authorities, that I arrive at the above conclusion which resulted in the appeal being dismissed.

To wind up this ground of judgment, I feel secure in the thought that the defendant is still within time even if I had allowed the appeal as according to the LA his last date of filing is 6 September 1997. In other words, even if this present action had been struck off for want of compliance of O 3 r 6, there was nothing to prevent him from re-filing another application. For the record, may I add that I did chide both parties for their non-compromising attitude when the matter came before me but unfortunately, the instructions of their clients held sway over their better judgments.

Order accordingly.

Reported by Jafisah Jaafar